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Office of Administrative Law Judges
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Issue date: 25Jul2001

CASE NO.: 2001-LHC-181

OWCP NO.: 07-143808

IN THE MATTER OF

STEPHONY SMITH,
Claimant

v.

NAVY PERSONNEL COMMAND,
Employer

and

CCSI,
Carrier

APPEARANCES:

Timothy Marcel, Esq.
On behalf of the Claimant

Kathleen Charvet, Esq.
On behalf of the Employer and Carrier

Before: Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER

This is a request for modification of benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, et. seq., brought by U.S. Bureau of Naval

Personnel/Morale, Welfare and Recreation and Contract Claim Services, Inc. (Employer/Carrier), against Stephony Smith (Claimant), pursuant to Section 22 of the Act. The issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held before me on April 23, 2001, in Metairie, Louisiana.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their positions. Claimant testified and introduced eighteen exhibits, all of which were admitted into evidence, (CX-1 to CX-18), including Dr. Robert E. Ruel's medical records from January 29, 1999 to January 23, 2001, and depositions (taken January 25, 1999 and April 18, 2001) concerning Claimant's physical condition; May 12, 1997 and June 13, 2000 MRI reports by Crescent City MRI; June 13, 2000 electrodiagnostic report of Dr. Daniel J. Trahant; Dr. John F. Schuhmacher's September 20, 2000, January 21, 2001 and March 5, 2001 reports on Claimant; medical records and account statement of Lakeland Hospital from April 12, 1999 to April 20, 1999; Dr. John R. Macgregor's medical records from February 10, 2000 to March 1, 2001 and deposition testimony taken September 27, 2000; Dr. Albert P. Koy's January 22, 2001 and April 8, 2001 reports on Claimant; Cindy A. Harris' vocational rehabilitation reports from July 6, 2000 to March 1, 2001; Dr. E. Edmund Kerut's medical records from June 30, 2000 to December 5, 2000 and deposition testimony taken April 6, 2001; medical records of West Jefferson Medical Center from January 24, 2001 to January 27, 2001; itemized statement of account of Drs. Iteld, Bernstein & Associates for April 12, 1999 to April 19, 1999; Dr. James P. Marra's May 9, 2000 consultation report; and Employer/Carrier March 5, 2001 discovery responses.

Employer introduced nineteen exhibits, eighteen of which were admitted into evidence, (EX-25 to EX-41 and EX-43), including the Petition for Modification with exhibits and three amended petitions with exhibits; medical records from Methodist Psychiatric Pavilion; Dr. Betty Dowty's medical records; Debbie Cromwell's vocational rehabilitation reports; Dr. Ruel's updated medical reports; Dr. Sharon Hoffman's deposition testimony; Dr. Lori Palazzo's deposition testimony; Judy Robison's deposition testimony; certification requirements of the American Board of Medical Specialties and American Board of Psychiatry and Neurology, Inc.; excerpt from the Diagnostic and Statistical Manual of Mental Disorders; OWCP documents: LS-207, Notices of Controversion, dated September 28, 1999, March 2, 2000, May 11, 2000, July 28, 2000, July 31, 2000, and September 5, 2000; Medical records from Tulane Medical Center; video surveillance of Claimant dated January 11, 2000, and February 3, 2000; Dr. Richard R. Roniger's September 20, 2000 psychiatric report on Claimant; and the May 23, 2001 post-hearing deposition testimony of Cindy A. Harris.

Post-hearing briefs were filed by the parties. Based upon the stipulations of the parties,

the evidence introduced, my observation of the witnesses' demeanor, and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-1) and I find:

1. Claimant was injured on April 11, 1997.

2. Claimant's injury was in the course and scope of her employment.

3. An Employer/Employee relationship existed at the time of the accident.

4. Employer was timely advised of Claimant's injuries.

5. Employer timely controverted the claim.

6. An informal conference was held in connection with this matter on August 12, 1997.

7. Claimant's Average Weekly Wage is $280.00, with a weekly compensation rate of $200.27, plus any cost of living adjustment.

8. Employer/Carrier paid Claimant TTD from April 12, 1997 to April 23, 2001, at $280.00 weekly.

9. Claimant reached Maximum Medical Improvement on October 30, 1997.

10. Employer/Carrier paid medical benefits for treatment by Dr. Ruel and limited psychiatric treatment with Dr. John Macgregor.

II. ISSUES

The following unresolved issues were presented by the parties:

1. Nature and extent of Claimant's disability from May 2, 2000 to August 29, 2000.

2. Whether Suitable Alternative Employment was established from May 2, 2000 through August 29, 2000.

3. Whether Claimant is entitled to cardiac treatment insofar as it regards cardiac care directly related to lumbar surgery.

4. Whether Claimant is entitled to cardiac treatment insofar as it relates to cardiac care necessary for orthopaedic, neurological and psychiatric treatment.

5. Whether Claimant's current cardiac status is causally related to her orthopaedic injury.

6. Whether Claimant is entitled to psychiatric treatment and whether such treatment should be limited to one visit per week, as contended by Employer/Carrier.

7. Whether Employer is entitle to Special Fund Relief based on any of the following:

A. Claimant had pre-existing permanent partial disabilities at the time of her April 11, 1997 injury. These pre-existing cardiac and psychiatric conditions were manifest to Employer and Claimant's disability is a combination of her pre-existing conditions and the results of her on-the-job injury.

B. Claimant's disability is materially and substantially greater because of her pre-existing conditions, and her present disability is greater than would have resulted from her on-the-job injury alone.

8. Attorney's fees.

III. STATEMENT OF THE CASE

A. BACKGROUND

This claim is based on an accident and injury to Claimant on April 11, 1997. Claimant sustained an injury to her back while working for Employer at the Naval Air Station located in Belle Chase, Louisiana. Claimant slipped on a wet floor and fell while walking through the kitchen of the Naval Air Station restaurant.

Employer commenced payment of temporary total disability benefits to Claimant on

December 8, 1997, for disability beginning on April 12, 1997, and continued payments through April 10, 1998. At that time, Employer controverted Claimant's entitlement to further compensation benefits based on a release to return to work following an orthopaedic evaluation and approval of jobs by Claimant's treating orthopaedic surgeon, Robert Ruel, M.D.

Employer subsequently reinstated temporary total disability benefits to Claimant from January 7, 1999, and continuing pursuant to a recommendation for surgery by Dr. Ruel. The case was referred to the Office of Administrative Law Judges and the first Formal Hearing took place on February 5, 1999.

On February 5, 1999, the following issues were presented for adjudication at the Formal Hearing before me: (l) causal relationship of cardiological and psychiatric treatment; (2) nature and extent of disability and date of maximum medical improvement; (3) suitable alternative employment; (4) average weekly wage; (5) Special Fund; (6) interest, penalties and attorney's fees.

In my Decision and Order dated May 21, 1999, I found, *inter alia*, that: (1) Claimant failed to establish a causal connection between her work-related accident and her heart condition; (2) she was entitled to compensation for a temporary total disability for her April 11, 1997 injury because of her orthopaedic condition which was temporary in nature because she was a candidate for lumbar surgery; (3) Claimant's inability to earn pre-injury wages was not related to her psychiatric problems and that she would only be entitled to medical benefits for her depression; (4) Claimant suffered from a pre-existing mental condition (depression) at the time of her work-related accident; (5) Claimant's psychological injury following her work-related accident combined with her pre-existing mental impairment to result in a worsening of her condition; and (6) Claimant was entitled to psychiatric treatment as long as her mental condition continued to suffer as a result of her work-related accident. No appeal was taken from the Decision and Order.

Subsequent to the hearing, on April 14, 1999, Claimant underwent a bilateral discectomy at the L5-Sl level performed by Dr. Ruel. On May 2, 2000, after a one-year period of rehabilitation, Dr. Ruel opined Claimant was at maximum medical improvement (MMI) and able to return to full time sedentary work. Dr. Ruel based his assessment on his review of Claimant's activities as evidenced in a series of video tapes. (EX-32, pp. 9-10; CX-1 p. 68). Dr. Ruel stated that he reviewed the video tape of Claimant, taken on two separate occasions, January 11, 200 and February 3, 2000, which showed Claimant walking in high heels, getting in and out of her vehicle, pushing grocery baskets, bending over the baskets and removing light plastic bags of groceries, turning her head side to side, and on one occasion, forcefully closing a van sliding type door. She was able to do the things noted on the video tape without any evidence of restriction. Dr. Ruel opined that Claimant's activity on video was not the same activity as demonstrated by Claimant following her lumbar discectomy on L5-S1, that she had

a reasonable result from her back surgery and that the cervical problem was not disabling. Dr. Ruel maintained his opinion that Claimant required ongoing orthopaedic and psychiatric treatment, as well as an EMG and nerve conduction study of her upper left arm.

However, during his August 29, 2000 examination of Claimant, Dr. Ruel noted a significant deterioration of her condition. (CX-12, p. 41). Based on Claimant's pain complaints, along with a new finding of back spasms, Dr. Ruel opined that her condition deteriorated from an orthopaedic position to the point where he did not believe she could not do even sedentary work. (CX-12, pp. 43, 53).

Employer filed a Petition for Modification based on an asserted change in physical and economic conditions, alleging Claimant's ability to earn wages she was receiving at the time of injury was no longer affected by her orthopaedic condition and that Employer had identified suitable alternative employment for Claimant within her restrictions. Employer filed three supplements to its original Petition for Modification and Pre-Hearing Statement to brief its alternative argument regarding Employer's entitlement to Special Fund Relief and to controvert the reasonableness, necessity, and efficacy of Dr. Macgregor's psychiatric treatment.

On April 18, 2001, prior to the Formal Hearing held before me on April 23, 2001 on Modification, Dr. Ruel was re-deposed. (CX-12). Dr. Ruel opined that Claimant was disabled from working because of her orthopaedic condition combined with her psychiatric condition and her cardiac condition. He placed Claimant at MMI on October 30, 1997, as the surgery he recommended (the bilateral discectomy) was of no benefit. Her orthopaedic condition decreased from light (pre surgery) to sedentary (post-surgery).

On May 23, 2001, Employer submitted a Motion to Reopen the Record for the Submission of Dr. Schuhmacher's April 23, 2001 report. Claimant opposed said motion, asserting that the evidence referred to information which was misleading and available prior to the hearing. Employer responded to Claimant's Opposition asserting that they did not receive Dr. Schuhmacher's report until the evening of April 23, 2001, after the hearing, at which time the record was still open as vocational expert, Cindy Harris (Harris), had not testified. I left the record open specifically for the purpose of taking Harris' deposition, which Employer construed as somehow leaving the record open for the submission of Dr. Schuhmacher's supplemental report. Furthermore, I agree with Claimant and find that describing said evidence as a report is misleading, as the document consists of two questions requiring yes or no responses, which is very conclusory. Thus, I reject Employer's request to submit Dr. Schuhmacher's report as Claimant would be unfairly denied the opportunity to cross examine and further, Dr. Schuhmacher issued this "report" based on Dr. Ruel's statement that he released Claimant to sedentary employment, which statement Dr. Ruel had since retracted, and which retraction was notably not disclosed to Dr. Schuhmacher.

On May 30, 2001, Employer submitted a Motion to Reopen the Record for the Submission of Harris' deposition. As stated above, the record was left open specifically for taking and submitting Harris' deposition, which exhibit I have accepted into the record and identified as EX-43, as previously noted.[1]

B. ORTHOPEDIC TREATMENT

After the accident, Claimant was initially treated by Dr. Catherine L. Loe, the emergency room (ER) physician at Meadowcrest Hospital. Dr. Loe ordered x-rays of the pelvis and lumbosacral spine, diagnosing evidence of some narrowing of the intervertebral disc at the L5-S1 level consistent with some degree of degenerative disc disease. She noted no evidence of fracture, dislocation or bone destruction of the pelvis or the lumbar vertebral bodies. Dr. Loe noted that there was evidence of calcification in the abdominal aorta consistent with arteriosclerosis, which was unusual for Claimant's age. Dr. Loe recommended further medical evaluation. She prescribed pain relievers and muscle relaxants, recommending referral to Claimant's family doctor, Lori Palazzo.

Dr. Schmuel Shapira, who treated Claimant on prior occasions for coronary artery disease and myocardial infractions and on April 23, 1997, performed a coronary angiography on Claimant, referred Claimant to Dr. Robert Ruel, an orthopaedic surgeon, for her complaints of cervical pain during the hospitalization involving the coronary angiography. On April 28, 1997, Claimant presented to Dr. Ruel, reporting her April 11, 1997 workplace slip and fall, in which she injured her neck and back. At the time of the office visit with Dr. Ruel, she complained of pain in the cervical spine radiating down the left arm with tingling to all digits of the left hand. Claimant reported painful neck motion and indicated that pain would radiate up the back of her head. She also complained of headaches and low back pain radiating down the left leg to the left foot with tingling. She reported the occurrence of a heart attack on April 21, 1997, and other heart attacks in the past. Following clinical examination, Dr. Ruel diagnosed a cervical lumbar sprain as a result of the slip and fall incident.

Claimant presented for physical therapy and returned to Dr. Ruel's office on May 8,

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[1] On July 11, 2001, Employer submitted a Motion and Incorporated Memorandum of Employer to Submit Errata Sheet. Employer omitted a key word, NOT, from a sentence on page 34 of the post-hearing brief. Essentially, Employer intended to argue in the brief that Claimant should NOT be permitted to recover psychiatric expenses for Dr. Macgregor's treatment. I accept said Motion and affirm that I understood Employer's argument that Claimant NOT be reimbursed, regardless of the Errata Sheet.

1997. Based on Claimant's persistent pain complaints, Dr. Ruel recommended an MRI of the lumbar and cervical spine. On May 12, 1997, Claimant underwent an MRI of the cervical and lumbar spine. The radiologist, Dr. H. Denny Taylor, provided the following impression: three millimeter broad based posterior sub-ligamentous herniation of the C6-7 disc and a one millimeter anterior and posterior bulging of the CS-6 intervertebral disc. In the lumbar spine, Dr. Taylor noted early dessication and degeneration of the L5-S1 disc and posterior bulging of the L5-S1 disc. Dr. Taylor also noted early hypotrophic and degenerative change to the lower lumbar interarticular facet joint. (CX-2, pp.1-2).

Claimant continued conservative care with Dr. Ruel and had several epidural steroid injections. On November 25, 1997, Dr. Ruel determined that Claimant had reached MMI and that she was not a surgical candidate. He advised that she could return to a sedentary occupation. Employer retained the services of a vocational rehabilitation consultant, Debbie Cromwell (Cromwell), to help Claimant become gainfully employed. She completed a labor market survey with job leads and contacts for Claimant.

Dr. Ruel, however, subsequently opined that Claimant was a candidate for lumbar surgery. On April 14, 1999, Dr. Ruel performed a bilateral hemilaminectomy and discectomy at the L5-S1 disc space. (CX-12, p. 7). Dr. Ruel recommended surgical intervention to improve and relieve Claimant's back condition and leg symptoms. (CX-12, p. 17). Prior to performing the surgery, Dr. Ruel consulted with Dr. Bruce Iteld to obtain cardiac clearance. (CX-12, p. 8). Dr. Iteld performed an electrocardiogram on April 12, 1999. (CX-1, p. 22). After surgery, Dr. Ruel consulted Dr. James Mace to address Ms. Smith's post-surgical complaints of chest pressure. (CX-1, p. 12). On April 17, 1999, Dr. Mace performed an angiogram, prior to Dr. Ruel's discharge of Claimant from Lakeland Hospital.

Following her discharge from the hospital, Claimant continued to be treated by Dr. Ruel. (CX-1). On April 29, 1999, Dr. Ruel noted Claimant's reports of stiffness in her lower back and soreness. (CX-1, p. 28). The next office visit was on July 15, 1999, at which time Claimant reported her lower back was improving, but she was experiencing episodes of sharp pain and flare ups of neck pain. (CX-1, p. 30). Dr. Ruel further noted observations that Claimant's range of motion in her back was markedly restricted in each of the just mentioned post-surgical examinations. (CX-1).

On September 16, 1999, November 18, 1999 and December 9, 1999 office visits, Claimant reported to Dr. Ruel that her lower back was okay as long as she did absolutely nothing, as well she related radiating pain down her left leg. (CX-1, p. 35; CX-12, pp. 14, 15, 40).

On February 7, 2000, Dr. Ruel observed that Claimant had an early reversal of the lumbar curvature. (CX-1, pp. 66-67; CX-12, p. 20). Dr. Ruel attributed this condition to

Claimant's range of motion restrictions in her back. (CX-12, p. 7). During this visit, Claimant related lower back discomfort, radiating down her left leg to her left foot, with numbness, and that her left leg had given out on her on occasion. (CX-1, p. 42). Further, Claimant reported that she had been experiencing neck pain on her left side and frequent headaches. Dr. Ruel opined that Claimant may need a lumbar fusion in the future. (CX-12, p. 25). In his February 10, 2000 report to Carrier, Dr. Ruel stated that Claimant's prognosis was poor because of the multitude of her problems. (CX-1, p. 66).

On April 3, 2000, Claimant presented to Dr. Ruel with low back pain radiating into her left leg and foot and numbness and tingling in her left arm into her left hand. (CX-1, pp. 68-69). Dr. Ruel continued to note significant restriction in her range of motion in her back. Claimant underwent a series of MRI studies of her lumbar and cervical spine at Crescent City MRI on June 13, 2000. (CX-2, pp. 3-5). The MRI study of her cervical spine revealed a posterior central disc prolapse at C5-6, a broad based posterior disc prolapse at C6-7, and a posterior left paracentral disc prolapse at C7-T1. Further, the report stated that Claimant had neural foraminal stenosis on the left at C5-6 and particularly on the right at C7-T1. In her lumbar spine, the MRI study revealed desiccation and decreased height at L5-S1. Additionally, 2mm posterior annulus fibrosis prominence along the medial margin of the left discectomy site was present.

Nerve conduction studies were performed by Dr. Daniel Trahant on June 13, 2000. (CX-3). Dr. Trahant reported that Claimant suffered from chronic pathology of the L5 nerve roots bilaterally and perhaps the S1 nerve roots as well. (CX-3, p. 4). The study of Claimant's upper extremities was normal. However, Dr. Ruel opined that her nerve condition in her cervical spine could convert from normal to positive given the condition of her cervical disc spaces. (CX-2, p. 54).

At the request of Dr. Ruel, Claimant underwent a neurological examination on September 20, 2000, by Dr. John F. Schuhmacher. (CX-4, p. 1). After reviewing the MRI studies performed on June 13, 2000, Dr. Schuhmacher recommended a repeat MRI of Claimant's cervical spine or a Myelogram slant CT scan due to multilevel disc bulges in that region to obtain better information. (CX-4, p. 4). With respect to her lumbar spine, Dr. Schuhmacher noted postoperative changes but no evidence of recurrent disc herniation. (CX-4, p. 4). On March 5, 2001, Dr. Schuhmacher entered a chart note withdrawing his recommendation for further diagnostic studies of Claimant's cervical spine in light of her cardiac condition. (CX-4, p. 8).

On May 2, 2000, Dr. Ruel issued a report to Carrier in response to the videotaped surveillance of Claimant taken on June 11, 2000 and February 3, 2000. (EX-32, pp. 9-10; CX-1, p. 68). Dr. Ruel stated that based upon the images contained in the videotape, he thought Claimant was getting along better that he initially believed and released her to sedentary work.

However, during his August 29, 2000 examination of Claimant, Dr. Ruel noted a significant deterioration of her condition. (CX-12, p. 41). Claimant repeated complaints of lower back pain and discomfort radiating into her left leg and foot, with numbness, together with numbness and tingling in the left side of her neck radiating to her left hand and fingers. Dr. Ruel noted the continued presence of sciatica and for the first time detected spasms in her paravertebral muscles. Based on these findings, Dr. Ruel opined that her condition deteriorated from an orthopaedic position to the point where he did not believe she could do even sedentary work. (CX-12, pp. 43, 53). Moreover, Dr. Ruel testified that Claimant's symptomology has continued to deteriorate since August 29, 2000, thus she remains incapable of even sedentary work. (CX-12, p. 58).

Thereafter, Dr. Ruel examined Claimant on October 24, 2000, January 23, 2001 and April 16, 2001. On October 24, 2000, Dr. Ruel noted that Claimant's range of motion in her back was slightly improved from her last visit. However, she continued to relate numbness and tingling from the left side of her neck down her left arm into the fingers of her left hand. (CX-12, p. 46). During the January 23, 2001 visit, Dr. Ruel noted increased restrictions in her low back range of motion and spasms. (CX-12, pp. 48- 49). In her April 16, 2001 examination, Claimant reported constant numbness in her left little finger and ring fingers. (CX-12, p. 50).

Dr. Ruel described Claimant's symptoms as typical of patients with chronic back problems, with some days better than others. (CX-12, p. 59). Dr. Ruel opined the prognosis for Claimant's neck and back was poor. (CX-12, p. 55). She suffers from chronic nerve pain and numbness and nothing more could surgically be done. (CX-12, p. 54). Dr. Ruel related the constant tingling and numbness in Claimant's left arm and hand to three level cervical disc disease at C5-6, C6-7 and C7-T1, including spinal cord compression at C5-6, C6-7 and C7-T1, as well as neural foraminal stenosis. (CX-12, pp. 54, 56). Claimant regularly experienced pain and discomfort in her low back, radiating to her left leg and foot. MRI and nerve conduction studies revealed damage to her L5 and possibly her S1 nerve roots, attributable to the narrowing of her disc space and post-surgical scarring. Dr. Ruel testified that Claimant's condition was at MMI as of October 30, 1997, and he did not expect her condition to improve. (CX-12, pp. 62-63).

C. PSYCHIATRIC TREATMENT

On May 13, 1998, Claimant went to Rosenblum Mental Health Center in Hammond, Louisiana for psychiatric screening, where she provided a nineteen year history of episodic

depression to the treating psychiatrist, Dr. Sharon Hoffman. Claimant provided a history of being on anti-depressant medication (Paxil) prescribed by another treating physician, Dr. Lori Palazzo. Dr. Hoffman testified that Claimant's psychiatric condition was not disabling. (EX-33, pp. 37-39). Claimant discontinued receiving treatment from the Rosenblum Mental Health Center several months prior to her April 1999 surgery because she was no longer staying in the Hammond area.

Since February 9, 2000, Claimant has been under the care of Dr. John Macgregor. As presented by Employer, Dr. Macgregor does not have a board certification in psychiatry; but 50% to 60% of his psychiatric practice involves treating individuals with psychiatric problems secondary to physical limitations caused by injury and Dr. Macgregor has received numerous appointments by the Department of Labor to perform independent medical examinations since the late-1970's. (Tr. 33).[2]

Furthermore, Claimant's treating physician referred Claimant to Dr. Macgregor in December of 1999, and Dr. Ruel submitted a request to Carrier at that time for approval of a consultation. (CX-12, pp. 19, 21). Although Claimant had a history of treatment for depression, Dr. Ruel felt that her psychiatric condition was related to the pain she was experiencing and adversely affecting his treatment of her orthopaedic problems. Dr. Ruel testified that he has referred numerous orthopaedic patients to Dr. Macgregor over the years.

Dr. Macgregor initially saw Claimant on February 9, 2000. (CX-7, p.1). In a February 10, 2000 report to Carrier, Dr. Macgregor related that Claimant presented the following symptoms: depressive moods, pent-up anger and irritability, strained inter-personal relations, verbal temper outbursts, lower frustration tolerance, decreased libido, hyperphagia with 35 pound weight gain, nocturnal insomnia, diurnal somnolence, easy fatigability/lack of energy, relative social isolation and withdrawal, loss of interest in previously enjoyed activities, markedly lower self-esteem, hypersensitivity to guilt feelings, heightened feelings of self criticism, crying spells, feelings of hopelessness and helplessness, fleeting suicidal thoughts, homicidal fantasies, apathy and anhedonia, shortened attention span, impaired concentration, generalized nervous tension and periodic anxiety. Based on the symptoms presented, Dr. Macgregor diagnosed Claimant with Major Depressive Reaction and recommended immediate intensive psychiatric treatment, including psychotherapy three times per week and psychotropic medications. (CX-7, p. 2). Dr. Macgregor further reported that he expected long-term treatment given her physical incapacitation from employment, which acts as a persistent precipitant for major depressive symptoms. (CX-7, p. 2).

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[2] Although not certified, Dr. Macgregor is board eligible in psychiatry and thus is entitled to practice psychiatry.

Claimant's psychiatric condition was so severe in February of 2000 that Dr. Macgregor treated her while awaiting approval from Carrier. (Tr. 51). The extended period of time and difficult process of getting Carrier to approve the recommended psychiatric treatment exacerbated Claimant's symptoms and at one point even resulted in Claimant's withdrawal from treatment out of concern that Dr. Macgregor would not be compensated for his services. (Tr. 64). Claimant did not appear for scheduled appointments during a three week period because Carrier had yet to provide medical benefits. (CX-7, p. 5). This hiatus in the month of March resulted in a worsening of her symptoms. (CX-7, p. 5).

The treatment course recommended by Dr. Macgregor of three psychotherapy sessions per week was implemented, however, a cardiac assessment was requested in March of 2000 prior to prescribing psychotropic medications. (CX-7, p. 3). Dr. Macgregor continued treating Claimant on a three-times per week psychotherapy regimen, even when Carrier filed a writ of reconsideration, which threatened to interrupt Claimant's psychiatric treatment, which threat of interruption further exacerbated Claimant's symptoms. (CX-7, p. 7; Tr. 52).

From March of 2000 to March of 2001, Dr. Macgregor's reports to Carrier indicated Claimant's psychiatric condition was quite volatile. (CX-7). The symptoms described in his initial report of February 10, 2000, continued in various degrees throughout this period. (CX-7). Dr. Macgregor characterized Claimant's efforts as cooperative and diligent and her progress as up and down. (Tr. 52).

In a June 1, 2000 report to Carrier, Dr. Macgregor stated that Claimant experienced a worsening of her psychiatric symptoms due to increased subjective complaints of physical pain and heightened anxiety and untoward emotions associated with Dr. Ruel's reaction to videotape surveillance. (CX-7, p. 10). Dr. Macgregor reported that he was awaiting a cardiac evaluation prior to prescribing psychotropic medications, noting that Employer's counsel had recently sent him a letter denying his request for authorization through Carrier for a cardiac evaluation. Dr. Macgregor noted in a June 22, 2000 report to Carrier that Claimant experienced an up and down course of symptomology, which coincided with her subjective reports of increased pain and physical incapacitation due to her industrial injuries. (CX-7, p. 13). Dr. Macgregor noted in his June 22, 2000 report that despite her obstacles, Claimant's suicidal ideation had dissipated and with each relapse she redoubled her efforts in psychotherapy, showing her improving ability to regain control over her untoward emotions. (CX-7, pp. 13-14). Upon completion of his June 22, 2000 report, Dr. Macgregor was still awaiting a report from claimant's cardiologist prior to prescribing psycho tropic medications.

On July 31, 2000, Carrier informed Dr. Macgregor that it would authorize no more than one visit a week as reasonable and necessary psychiatric treatment for Claimant. Dr. Macgregor was adamant that one visit weekly was not reasonable for carrying out effective psychiatric treatment for Claimant, whose psychiatric treatment had worsened in the previous

month to the point where Claimant was having serious suicidal ideation. (CX-7, p. 15). Dr. Macgregor stressed that Claimant needed intensive psychiatric treatment at a frequency of no less than three times per week.

Subsequently, Claimant's psychiatric condition showed mild-to-moderate improvement in August of 2000, which Dr. Macgregor attributed to the continuing thrice-weekly psychotherapy sessions and Claimant's diligent efforts in psychotherapy. (CX-7, p. 18). The improvement continued into September, however, a flare-up in Claimant's orthopaedic condition led to a relapse of her psychiatric symptoms. (CX-7, p. 22). In October, Claimant made progress early in the month, but suffered a severe exacerbation the second half of the month traced to her worsening orthopaedic condition and physical incapacitation. (CX-7, p. 20).

On August 22, 2000, Dr. Richard R. Roniger, board certified psychiatrist, evaluated Claimant at the request of Employer. (Tr. 102; EX-41). Dr. Roniger had evaluated Claimant on two prior occasions in January and February of 1999. Dr. Roniger determined the primary cause of Claimant's recurrent depressive episode was her long-standing history of recurrent major depression. Dr. Roniger agreed with Dr. Hoffman that Claimant's depression was not disabling. Dr. Roniger recommended reasonable, necessary and
appropriate psychiatric treatment designed to improve and/or remit Claimant's depressive episodes, including prescription anti-depressant medication. Nonetheless, Dr. Roniger saw no indication whatsoever for intensive psychotherapy three times weekly.

In a letter dated November 30, 2000, Carrier again advised Dr. Macgregor that it would not authorize three psychotherapy sessions per week. (CX-7, p. 26). Dr. Macgregor continued treating Claimant on a three-session per week frequency after November, 2000, because she continued to suffer from severe symptoms of Major Depression, including episodically serious suicidal ideation. (CX-7, p. 26). In his report dated December 6, 2000, Dr. Macgregor advised Carrier that repeated efforts to curtail Claimant's treatment only served to inflame her condition. (CX-7, p. 26).

An independent medical examination of Claimant was ordered by the Department of Labor with Dr. Albert Koy. (CX-8, p. 1). In his report dated January 22, 2001, Dr. Koy found Claimant to have multiple physical and mental-emotional problems and recommended that she continue seeing Dr. Macgregor for psychotherapy three times per week for a tong period of time. (CX-8, p. 3).

The reports issued by Dr. Macgregor to Carrier indicated Claimant's symptoms were exacerbated in December of 2000 and January and February of 2001. (CX-7). Dr. Macgregor correlated Claimant's psychiatric condition to flare-ups in her orthopaedic symptoms. In his February 1, 2000 report, Dr. Macgregor noted that January was exceedingly difficult and

Claimant experienced a significant exacerbation of her symptoms. (CX-7, p. 29).

According to Dr. Macgregor, the severity of Claimant's psychiatric condition requires continued intensive treatment. (Tr. 52). It is Dr. Macgregor's opinion that Claimant will continue having problems which require psychiatric treatment as long as her injury persists. (CX-15, p. 9). Dr. Macgregor testified that he does not expect to cure Claimant, however, it will help her function on a day to day basis despite her chronic pain. (Tr. 63).

D. CARDIAC TREATMENT

Since approximately 1990, Claimant has been under the care of the Heart Clinic of Louisiana, and more specifically, Dr. E. Kenneth Kerut for treatment of coronary artery disease, ischemic cardiomyopathy and congestive heart failure. (CX-14, p .9). As previously discussed herein, Dr. Ruel obtained cardiological consultations with Dr. Iteld and later with Dr. Mace before and after performing the bilateral discectomy on April 14, 1999. Dr. Kerut cannot state to a reasonable degree of medical certainty whether Claimant's 1997 workplace accident had any causal relationship to her cardiac condition, including her longstanding coronary artery disease and ischemic cardiomyopathy. He has opined that her cardiac condition will progressively worsen and shorten her life span. (CX-14).

Claimant was also treated by Dr. Shapira for coronary artery disease and myocardial infractions. On April 23, 1997, Dr. Shapira performed a coronary angiography on Claimant. Dr. Shapira testified that Claimant had a diagnosis of coronary spasm attributable to cigarette smoking.

Claimant was also evaluated by Dr. Lawrence O'Meallie, a Board Certified Cardiologist, who conducted an independent medical examination at the request of Employer. He determined that Claimant's cardiac condition was and is unrelated to Claimant's April 1997 workplace accident.

E. VOCATIONAL REHABILITATION

Following Dr. Ruel's May 2, 2000 release of Claimant to sedentary employment, Employer again retained Cromwell to assist Claimant in locating SAE. Cromwell ascertained the restrictions and limitations that Dr. Ruel had placed on Claimant and completed an updated

labor market survey dated June 19, 2000. (EX-31). Position titles and job descriptions were provided to Dr. Ruel and Employers were identified in a second listing that was provided to Claimant, but the second listing did not reference the first listing of position titles and job descriptions. Also, the record does not indicate whether Dr. Ruel actually approved any of the positions as suitable for Claimant. No descriptions of the physical requirements or demands of the positions offered by named Employers were provided, thus it is impossible to determine whether these positions comported with the physical restrictions placed on Claimant by Dr. Ruel.

On June 23, 2000, the U. S. Department of Labor also referred Claimant to Cindy Harris (Harris), a board certified vocational rehabilitation counselor. (CX-9; EX-43, pp. 13-15). On July 18, 2000, Harris completed a transferable skills analysis and on July 31, 2000, she completed a vocational rehabilitation report, which identified potential sedentary positions, but Harris did not determine specifics about the physical requirements of each position, for example, would a particular position allow for alternate sitting and standing. (CX-9, pp. 8-10). Throughout the following month Harris provided vocational counseling and guidance to Claimant and developed a rehabilitation plan, which plan Harris reviewed with Claimant on September 6, 2000. Harris recommended that Claimant participate in two computer training courses offered through the University of New Orleans. Claimant completed the recommended training and Harris subsequently recommended job placement services. On December 15, 2000, Harris placed Claimant's file on interrupted status due to Claimant's non-work-related cardiac conditions.

Surveillance Video

On January, 11, 2000, and February 3, 2000, Claimant was videotaped resulting in approximately 15 minutes of videotape of videotape. (Tr. 124-25; EX-40). The surveillance video reflected Claimant's routine daily activities, such as driving, shopping, walking and loading grocery bags into her vehicle one bag at a time. The surveillance video had been provided to doctors who viewed it and rendered opinions on the video; therefore, the video was offered solely to provide a complete picture of certain medical treatment and/or opinions. (CX-4). As referenced above, on May 2, 2000, the video was shown to Dr. Ruel who released Claimant to MMI on May 2, 2000 after viewing the video, as well the video was shown to other physicians who evaluated and/or treated Claimant. (CX-12, pp.31, 57). Dr. Ruel testified that he felt violated in some sense after viewing the tape and thought that maybe Claimant was dishonest, thus he reported that he believed she was capable of doing sedentary work. However, subsequent testing in June of 2000 revealed the nature and extent of Claimant's back problems. (CX-2; CX-3). In fact, by August of 2000, Dr. Ruel had again completely restricted Claimant from working.

IV. DISCUSSION

A. Contentions of the Parties

Claimant asserted that: (1) she remains permanently and totally disabled; (2) she is entitled to all reasonable and necessary future medical expenses for treatment of her injury by, or at the direction of, Drs. Ruel and Macgregor, under Section 7 of the Act; (3) that she is entitled to medical benefits for cardiac treatment necessary for the treatment of her back and neck injuries; and, (4) she is entitled to attorney's fees.

On the other hand, Employer asserted that: (1) Claimant's orthopaedic condition changed from temporary disability to permanent disability, with the stipulated date of MMI being October 30, 1997, thus entitling Employer to Special Fund relief; (2) they demonstrated the availability of SAE, thus limiting Claimant to loss of wage earning capacity from May 2, 2000 and continuing; and, (3) Claimant's psychiatric treatment is unauthorized, failed, and is unreasonable and a change in protocol is appropriate pursuant to Section 7 of the Act.

B. Burden of Proof and Credibility

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333(1953); J. B. Vozzolo, Inc. v. Britton, 377 F. 2d 144(D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251(1994), aff'g. 990 F.2d 730(3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101(1997); Avondale Shipyards, Inc., v. Kennel, 914 F.2d 88, 91(5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co., v. Bruce, 551 F. 2d 898, 900(5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929(1968).

C. Prima Facie Case, Nature and Extent of Disability and Suitable Alternative Employment

To establish a *prima facie* claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing that: (1) the claimant sustained physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. Kier v. Bethlehem Steel Corp., 16 BRBS 128 (1984). In this case there is no question that Claimant established a *prima facie* claim.

Disability under the Act is defined as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Disability is an economic concept based upon a medical foundation distinguished by either nature (permanent or temporary) or extent (total or partial). A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649 (5th Cir. 1968); Seidel v. General Dynamics Corp., 22 BRBS 403, 407 (1989); Stevens v. Lockheed Shipbuilding Co., 22 BRBS 155, 157 (1989). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement (MMI). The determination of when MMI is reached, so that the claimant's disability may be said to be permanent, is primarily a question of fact based on medical evidence. Hite v. Dresser Guiberson Pumping, 22 BRBS 87, 91 (1989); Care v. Washington Metro. Area Transit Authority, 21 BRBS 248 (1988). In this case, there is no question that Claimant established the permanent nature of her condition.

The Act does not provide standards to distinguish between classifications and degrees of disability. Case law has established that in order to establish a prima facie case of total disability under the Act, Claimant must establish that he can no longer perform his former longshore job due to his job-related injury. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038, 14 BRBS 156 (5th Cir. 1981), *rev'g* 5 BRBS 418 (1977); P&M Crane Co. v. Hayes, 930 F.2d 424, 429-30 (5th Cir. 1991); SGS Control Serv. v. Director, Office of Worker's Comp. Programs, 86 F.3d 438, 444 (5th Cir. 1996). He need not establish that he cannot return to *any* employment, only that he cannot return to his former employment. Elliot v. C&P Telephone Co., 16 BRBS 89 (1984). The same standard applies whether the claim is for temporary or permanent total disability. If the claimant meets this burden, he is presumed to be totally disabled. Walker v. Sun Shipbuilding & Dry Dock Co., 19 BRBS 171(1986).

In the prior hearing before me in February of 1999 concerning this case, Claimant was deemed temporarily totally disabled based upon the medical evidence and the testimony of the

witnesses. The issue before me in the instant hearing is whether Claimant underwent a change in physical and economic conditions and whether her ability to earn wages she was receiving at the time of injury remains affected by her orthopaedic condition, as well whether Employer identified suitable alternative employment for Claimant within her restrictions.

Claimant asserted that she remains permanently and totally disabled. On the other hand, Employer asserted that Dr. Ruel released Claimant to sedentary work on May 2, 2000, and they demonstrated the availability of SAE, thus limiting Claimant to loss of wage earning capacity from May 2, 2000 **and continuing**. I also note that Employer stipulated that for purposes of Special Fund Relief, Claimant was permanently and totally disabled from October 30, 1997, the date of MMI, and continuing, except for the period of May 2, 2000 to August 29, 2000, which reflects a period of permanent partial disability. Thus, Employer contradicts its own argument that Claimant continues to be capable of sedentary employment because they admit Claimant remains permanently and totally disabled since October 30, 1997, **except for** the period May 2, 2000 to August 29, 2000, which reflects a period of permanent partial disability. Thus, I will make a determination whether Employment established SAE during that brief period of partial disability, but find that by Employer's own admission, as well as the established record, Claimant returned to a status of total disability on August 29, 2000, when Dr. Ruel reinstated total restrictions from work, and Claimant remains totally restricted from work.

Once the case of total disability is established, the burden shifts to the employer to establish the availability of suitable alternative employment (SAE). Turner, 661 F.2d at 1038; P&M Crane, 930 F.2d at 430; Clophus v. Amoco Prod. Co., 21 BRBS 261(1988). Total disability becomes partial on the earliest date on which the employer establishes SAE. Palombo v. Director, OWCP, 937 F.2d 70, 25 BRBS 1(CRT)(D.C. Cir. 1991); Rinaldi v. General Dynamics Corp., 25 BRBS 128(1991). An employer must show the existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. An employer can meet its burden by offering the injured employee a light duty position at its facility, as long as the position does not constitute sheltered employment. Darden v. Newport News Shipbuilding & Dry Dock Co., 18 BRBS 224 (1986). If the employer does offer suitable work, the judge need not examine employment opportunities on the open market. Conover v. Sun Shipbuilding & Dry Dock Co., 11 BRBS 676, 679(1979). If employer does not offer suitable work at its facility, the Fifth Circuit in Turner, established a two-pronged test by which employers can satisfy their alternative employment burden:

> (1) Considering claimant's age, background, etc., what can claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?

> (2) Within this category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and he could realistically and likely secure? This second question in effect requires a determination of whether there exists a reasonable likelihood, given the claimant's age, education, and vocational background that he would be hired if he diligently sought the job.
>
> 661 F.2d at 1042; P&M Crane, 930 F.2d at 430.

If the employer meets its burden by establishing suitable alternative employment (SAE) the burden shifts to the claimant to prove reasonable diligence in attempting to secure some type of SAE shown within the compass of opportunities, by the employer, to be reasonably attainable and available. Turner, 661 F.2d at 1043. Termed simply, the claimant must prove a diligent search and the willingness to work. Applebaum v. Halter Marine Serv., 19 BRBS 248(1987). Moreover, if the claimant demonstrates that he diligently tried and was unable to obtain a job identified by the employer, he may prevail. Roger's Terminal & Shipping Corp., v. Director, OWCP, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir.), *cert. denied*, 479 U.S. 826(1986); Hooe v. Todd Shipyards Corp., 21 BRBS 258(1988). If the claimant fails to satisfy this "complementary burden," there cannot be a finding of total and permanent disability under the Act. Turner, 661 F.2d at 1043; Southern v. Farmers Export Co., 17 BRBS 64(1985).

There was no dispute that Claimant could not return to her prior position for Employer due to her orthopedic injuries. The record contains objective medical evidence that Claimant is unable to return to her former employment and indicates that she suffered permanent restrictions due to her workplace injury.

Employer argued that they demonstrated the availability of SAE within the limitations outlined by Claimant's treating orthopaedic surgeon with no resultant loss of wage-earning capacity throughout the period of May 2, 2000 through August 29, 2000, and on a continuing basis. Employer presented labor market information conducted by Cromwell and Harris, which allegedly established that jobs were available for Claimant and she declined to apply for almost all of them, despite the ongoing offers for placement assistance made by Cromwell and Harris.

Reliant upon Dr. Ruel's reaction to viewing the videotape surveillance of Claimant, Cromwell was commissioned to perform an updated labor market survey. In a June 19, 2000 report, Cromwell purports that numerous viable employment vacancies appeared in the area for which Claimant was qualified. (EX-31, p. 2). However, omitted were descriptions of the physical requirements or demands of the position offered by those employers named, which is insufficient to satisfy Employer's burden. (EX-31). Harris was unable to provide an opinion as to whether the jobs identified were suitable for Claimant. (EX-43, pp. 74-79). I

find that the labor market surveys presented by Cromwell and Harris failed to establish SAE for Claimant.

Additionally, as pointed out by Claimant's counsel, Claimant was entitled to continued benefits during the period in which Dr. Ruel stated she was capable of performing sedentary work, even if Employer had satisfied its burden of establishing SAE, which I find it did not, because commencing on June 23, 2000, she was enrolled and actively participating in a vocational rehabilitative program sponsored by the Department of Labor. Abbott v. LIGA, 27 BRBS 192 (1993); (CX-9). A Claimant may receive continuing permanent total disability compensation where the employer has established the availability of SAE at a minimum-wage level, but the Claimant is precluded from working because he is undergoing vocational rehabilitation. Id. In Abbott, at 203, the Board held that while the claimant was physically capable of performing entry level minimum wage work of a sedentary nature, this employment was not realistically available to him because his participation in the U.S. Department of Labor sponsored program precluded him from working. The Board found that its holding clearly served the Act's goal of promoting the rehabilitation of injured employees to enable them to resume their places, to the greatest extent possible, as productive members of the workforce. Id.

Accordingly, based on the foregoing, I find Employer failed to establish SAE during the brief period of time, from May 2, 2000 to August 29, 2000, when Claimant was released to sedentary duty by Dr. Ruel. Thus, I find Claimant is entitle to continuing permanent total disability from October 30, 1997, the stipulated date of MMI, and continuing.

D. Entitlement to Medical Care and Benefits

Pursuant to Section 7(a) of the Act, 33 U.S.C. § 907(a), Employer is responsible for reasonable and necessary medical expenses that are related to Claimant's compensable injury. Parnell v. Capitol Hill Masonry, 11 BRBS 532, 539(1979); Pardee v. Army & Air Force Exchange Serv., 13 BRBS 1130(1981). Medical care must be appropriate for the injury. 20 C.F.R. § 702.402. A claimant has established a *prima facie* case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258(1984). The claimant must establish that the medical expenses are related to the compensable injury. Pardee, 13 BRBS at 1130; Suppa v. Lehigh Valley R.R. Co., 13 BRBS 374(1981). The employer is liable for all medical expenses which are the natural and unavoidable result of the

work injury, but not due to an intervening cause. Atlantic Marine v. Bruce, 661 F.2d 898, 14 BRBS 63(5th Cir. 1981), *aff'g* 12 BRBS 65(1980). Furthermore, an employee's right to select his own physician, pursuant to section 7(b), is well settled. Bulone v. Universal Terminal and Stevedore Corp., 8 BRBS 515 (1978).

An employee cannot receive reimbursement for medical expenses unless he has first requested authorization, prior to obtaining treatment, except in cases of emergency or refusal/neglect. 20 C.F.R. § 702.421; Shahady v. Atlas Tile & Marble Co., 682 F.2d 968 (D.C. Cir. 1982) (*per curiam*), *rev'g* 13 BRBS 1007(1981), cert. denied, 459 U.S. 1146(1983); McQuillen v. Horne Brothers Inc.,16 BRBS 10(1983); Jackson v. Ingalls Shipbuilding, 15 BRBS 299(1983).

Consent to change physicians *shall* be given when the employee's initial free choice was not of a specialist whose services are necessary for, and appropriate to, proper care and treatment. Consent may be given in other cases upon a showing of good cause for change. Slattery Associates, Inc., v. Lloyd, 725 F.2d 780, 786, 16 BRBS 44(CRT)(D.C. Cir. 1984); Swain v. Bath Iron Works Corp., 14 BRBS 657 (1982). The regulation only states that an employer *may* authorize a change for good cause; it is not *required* to authorize a change for this reason. Swain, 14 BRBS at 665.

In Armfield v. Shell Offshore, 25 BRBS 303, 309 (1992), the Board affirmed the judge's conclusion that the claimant was not required to seek prior authorization for her psychiatric treatment where the evidence indicated that the claimant had been referred to the psychiatrist by her treating physician. The initial physician was thus providing the care of a specialist whose services were necessary for the proper care and treatment of the compensable injury pursuant to §§ 7(b) and (c)(2) of the LHWCA. Id.

Once the employer has refused to provide treatment or to satisfy a claimant's request for treatment, the claimant is released from the obligation of continuing to seek employer's approval. Pirozzi v. Todd Shipyards Corp., 21 BRBS 294(1988). The claimant then need only establish that the treatment subsequently procured on his own initiative was necessary for treatment of the injury, in order to be entitled to such treatment at the employer's expense. Rieche v. Tracor Marine, 16 BRBS 272 (1984); Wheeler v. Interocean Stevedoring, 21 BRBS 33(1988). The employee need not request treatment when such a request would be futile. Shell v. Teledyne Movable Offshore, 14 BRBS 585, 590 n.2(1981).

Section 7(d)(2) of the Act provides in pertinent part that:

> (2) No claim for medical or surgical treatment shall be valid and enforceable against such employer unless, within ten days following the first treatment, the

> physician giving such treatment furnishes to the employer and the deputy commissioner a report of such injury or treatment, on a form prescribed by the Secretary. The Secretary may excuse the failure to furnish such report within the ten-day period whenever he finds it to be in the interest of justice to do so.

33 U.S.C. § 907(d)(2).

In the Decision and Order dated May 21, 1999, I found Claimant was entitled to all reasonable and necessary medical care and treatment arising out of her work-related injuries pursuant to Section 7(a) oft he Act, including Claimant's lumbar and cervical injuries, as well as her psychiatric condition. I also that Claimant was entitled to psychiatric treatment as long as her mental condition continued to suffer as a result of her work-related accident. No appeal was taken from the Decision and Order. Employer now seeks to deny or limit Claimant's medical benefits for psychiatric treatment, arguing that Claimant's psychiatric treatment is unauthorized because Claimant began treatment with Dr. Macgregor prior to obtaining approval to change psychiatric treatment from Dr. Sharon Hoffman and said treatment has failed, thus is unreasonable and a change in protocol is appropriate pursuant to Section 7 of the Act.

Dr. Hoffman's treatment was provided through the Rosenblum Mental Health Center in Hammond, which provides free mental health services to those in need in the Hammond area, where Claimant had been temporarily staying with a relative. Claimant sought and received this treatment on her own, independent of any authorization from Employer. Claimant discontinued visits with Dr. Hoffman when she became ineligible for such services because she was no longer staying in Hammond.

Dr. Macgregor has been treating Claimant for major depression since February, 2000, following a referral from Dr. Ruel, her treating physician. According to Armfield, 25 at 309, Claimant was not required to seek prior authorization for her psychiatric treatment with Dr. Macgregor because she had been referred to Dr. Macgregor by Dr. Ruel, her treating physician. The initial physician was thus providing the care of a specialist whose services were necessary for the proper care and treatment of the compensable injury pursuant to §§ 7(b) and (c)(2) of the LHWCA. Id.

Dr. Macgregor assessed Claimant and recommended immediate intensive psychiatric treatment, including psychotherapy sessions three times per week and psycho tropic medication. (CX-7, p. 2). Dr. Macgregor believed her condition so grave that he began treating Claimant on an emergency basis prior to authorization from Carrier. (Tr. 51). Moreover, a cardiac assessment was requested in March of 2000 prior to prescribing psycho tropic medications. (CX-7, p. 3). Again in a June 1, 2000 report to Carrier, Dr. Macgregor reported that he was awaiting a cardiac evaluation prior to prescribing psycho tropic medications, noting that Employer's counsel had recently sent him a letter denying his request

for authorization through Carrier for a cardiac evaluation. (CX-7, p. 10). Yet, Employer indicated Macgregor's treatment of Claimant was inferior because he waited to prescribe psycho tropic medication. The record indicates that if delays in prescribing psycho tropic medication were attributable to anybody, the delays were attributable to Carrier and not Dr. Macgregor.

Dr. Macgregor opined Claimant's current psychiatric condition was directly related to her back and neck injuries sustained in her April 11, 1997 workplace accident. (CX-15, pp. 5, 19). Throughout the course of her psychiatric treatment with Dr. Macgregor, the Employer has withheld coverage or reduced coverage. For several weeks, Employer did not approve treatment with Dr. Macgregor despite his report on the severity of her condition. (CX-7, pp. 1-35). Thereafter, Employer limited coverage to one session per week. (Tr. 102). Dr. Macgregor was unable to prescribe anti-depressants to Claimant until shortly before the hearing, as he was unable to get clearance from her cardiologists until that time. (Tr. 48).

Still, Employer argued that Dr. Roniger's treatment recommendations, based on his August 22, 2000 evaluation of Claimant at the request of Employer, should be followed to the exclusion of Dr. Macgregor's treatment recommendations. (Tr. 102; EX-41). Dr. Roniger determined the primary cause of Claimant's recurrent depressive episode was her long-standing history of recurrent major depression. Dr. Roniger recommended reasonable, necessary and appropriate psychiatric treatment designed to improve and/or remit Claimant's depressive episodes, including prescription anti-depressant medication. Nonetheless, Dr. Roniger saw no indication whatsoever for intensive psychotherapy three times weekly.

An independent medical examination was ordered by the Department of Labor of Claimant with Dr. Koy. (CX-8, p. 1). In his report dated January 22, 2001, Dr. Koy found Claimant to have multiple physical and mental-emotional problems and recommended that she continue seeing Dr. Macgregor for psychotherapy three times per week for a long period of time. (CX-8, p. 3).

In short, I find that the necessity for psychotherapy three times weekly and psycho tropic medication, as administered by Dr. Macgregor, is supported by the evidence, medical and otherwise, presented to the record. I credit Dr. Macgregor's opinion over Dr. Roniger's, as Dr. Macgregor has treated Claimant continuously for over a year and further, Dr. Koy, an independent examiner, affirmed Dr. Macgregor's recommendations. Notably, Employer's repeated efforts to curtail Claimant's psychiatric treatment only served to inflame her condition. (CX-7, p. 26).

Employer agreed to pay medical benefits for Claimant's cardiac treatment necessary for the treatment of her back and neck injuries, specifically the cardiac treatment just prior to and post her April 14, 1999 lumbar surgery, which were necessary for surgical clearance. As stated in my prior Decision and Order, Claimant failed to establish a causal connection

between her work-related accident and her cardiac condition, thus further medical benefits for cardiac services are not authorized under the Act. I also find that Employer must pay for cardiac consultations which were necessary in prescribing Claimant psycho tropic medication.

E. Special Fund Relief

Section 8(f) shifts a portion of the liability for permanent partial and permanent total disability from the employer to the Special Fund established by Section 44 of the Act, when the disability was not due solely to the injury which is the subject of the claim. Section 8(f) is, therefore, invoked in situations where the work-related injury combines with a pre-existing partial disability to result in a greater permanent disability than would have been caused by the injury alone. Lockheed Shipbuilding v. Director, OWCP, 951 F.2d 1143, 1144, 25 BRBS 85 (CRT) (9th Cir. 1991). Relief is not available for temporary disability, no matter how severe. Jenkins v. Kaiser Aluminum & Chemical Sales, 17 BRBS 183, 187 (1985). Most frequently, where Section 8(f) is applicable, it works to effectively limit the employer's liability to 104 weeks of compensation. Thereafter, the Special Fund makes the compensation payments.

Section 8(f) relief is available to an employer if three requirements are established: (1) that the claimant had a pre-existing permanent disability; (2) that this partial disability was manifest to the employer; and (3) that it rendered the second injury more serious than it otherwise would have been. Director, OWCP v. Berkstresser, 921 F.2d 306, 309, 24 BRBS 69 (CRT) (D.C. Cir. 1990), *rev'g* 16 BRBS 231 (1984), 22 BRBS 280 (1989). In cases of permanent partial disability the employer must also show that the claimant sustained a new injury, Jacksonville Shipyards v. Director, OWCP, 851 F.2d 1314, 1316-17, 21 BRBS 150 (CRT) (11th Cir. 1988) (en banc), and the current disability must be materially and substantially greater than that which would have resulted from the new injury alone. Louis Dreyfus Corp. v. Director, OWCP, 125 F.3d 884 (5th Cir. 1997); Director, OWCP v. Ingalls Shipbuilding, Inc., 125 F.3d 303 (5th Cir.). It is the employer's burden to establish the fulfillment of each of the above elements. *See* Peterson v. Colombia Marine Lines, 21 BRBS 299, 304 (1988); Stokes v. Jacksonville Shipyards, 18 BRBS 237 (1986).

In establishing the occurrence of a second injury to the employee, it has been clearly established that a work-related aggravation of an existing injury constitutes a compensable injury for purposes of section 8(f). Ashley v. Tide Shipyard Corp., 10 BRBS 42, 44 (1978); Foundation Constructors v. Director, OWCP, 950 F.2d 621, 625, 25 BRBS 71 (CRT) (9th Cir. 1991), *aff'g* 22 BRBS 453 (1989). However, there must be a showing of actual aggravation. If the results are nothing more than a natural progression of the preexisting condition, it cannot constitute the required second injury. Jacksonville Shipyards v. Director, OWCP, 851 F.2d

1314, 1316-17, 21 BRBS (CRT) (11th Cir. 1988) (en banc), *aff'g* Stokes v. Jacksonville Shipyards, 18 BRBS 237 (1986); Souza v. Hilo Transportation & Terminal Co., 11 BRBS 218, 223 (1979). Additionally, the Board has upheld the denial of Special Fund relief where the ALJ has found the aggravation too minimal to have contributed to the employee's ultimate disability. Stokes, 18 BRBS at 241. Claimant clearly sustained a subsequent injury when he injured his leg, causing an altered gait, which lead directly to the aggravation of his pre-existing back impairment.

From 1927 to 1972, employers could seek Section 8(f) relief only in cases where a claimant's injury resulted in permanent total disability. According to the 1927 version of the statute: If an employee receives an injury which of itself would only cause permanent partial disability but which, combined with a previous disability, does in fact cause permanent total disability, the employer shall provide compensation only for the disability caused by the subsequent injury. 33 U.S.C. §§ 908(f) (1927). The 1972 amendments broadened Section 8(f) relief to include permanent partial disability and in the course of doing so changed the language. Pub. L. No. 92-576, §§ 9(a).

In cases of permanent and total disability, the requirement that the two injuries "combine" was replaced by a requirement that the current level of "disability [be] found not to be due solely" to the most recent injury. As a result, in many cases the "combined with" and "not due solely" language is used either interchangeably or in conjunction. Either analysis appears to achieve the same result. Simply proving a prior disability is not enough, however; the employer must show that the second injury by itself would not have led to total disability. Two "R" Drilling Co. v. Director, OWCP, 894 F.2d 748, 750, 23 BRBS 34 (CRT) (5th Cir. 1990) (employer did not meet its burden of showing that the current total disability was not due solely to the employment injury because it failed to put on medical evidence to suggest that claimant's pre-existing back diseases contributed to his current total back disability). See Director, OWCP v. Luccitelli, 964 F.2d 1303, 1306, 26 BRBS 1 (CRT) (2d Cir. 1992); rev'g Luccitelli v. General Dynamics Corp., 25 BRBS 30 (1991) (remanded two cases to judges to determine whether the second injury alone (a knee injury, in one case, and a back injury, in the other case), was sufficiently debilitating to have caused permanent total disability); FMC Corp. v. Director, OWCP, 886 F.2d 1185, 1186-87, 23 BRBS 1 (CRT) (9th Cir. 1989) (pre-existing bursitis and heart murmur are not evidence that back injury is not the sole cause of the disability). In E.P. Paup Co. v. Director, OWCP, 999 F.2d 1341, 27 BRBS 41 (CRT) (9th Cir. 1993), the employer failed to prove pre-existing hand impairment contributed to total disability caused by back injury; not enough that hand injury made total disability even greater. See also Director, OWCP v. General Dynamics Corp., 982 F.2d 790, 26 BRBS 139, 150 (CRT) (2d Cir. 1992).

Courts have sometimes suggested that Special Fund relief is assured in "aggravation cases." E.g., Brannon, 607 F.2d at 1382. The issue of "aggravation" has no bearing, however, on

the element of Section 8(f) under discussion. Aggravation is a separate issue (as discussed above at 8.7.1) pertaining to whether there was a second injury. If there was a second injury the employer must still prove that it alone would not have resulted in permanent total disability. See Jacksonville Shipyards v. Director, OWCP, 851 F.2d 1314, 1316, 21 BRBS 150 (CRT) (11th Cir. 1988).

Employer argued that it is entitled to Special Fund Relief based upon Claimant's pre-existing permanent impairments attributable to cardiological and psychiatric conditions, which combined with and contributed to a materially and substantially greater overall disability than would have resulted from Claimant's April 11, 1997 employment incident alone. Employer asserted that based on Claimant's longstanding history of depression and cardiological conditions unrelated to her employment for Employer, if I recognize Claimant's disability claim, I should necessarily recognize that she has greater restrictions resulting from the combination of her cardiac, psychiatric and orthopaedic conditions than she would have as a consequence of the April 11, 1997 injury alone.

Nonetheless, as supported by the record, Claimant's orthopaedic condition alone would have resulted in total disability. In fact, it was on that basis that I found Claimant disabled in my first opinion. Employer pointed out in page three of their post-hearing brief that I determined in my May 21, 1999 decision that Claimant was entitled to compensation for a temporary total disability for her April 11, 1997 injury because of her orthopedic condition. Similarly, Claimant fails to establish a causal connection between her work-related accident and cardiac condition, as well Claimant's inability to earn pre-injury wages was not related to her psychiatric problems and she would only be entitled to medical benefits for her depression. Thus, Special Fund Relief would not be appropriate, as Claimant's orthopedic condition alone would have resulted in permanent total disability.

V. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

VI. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer/Carrier shall pay Claimant continuing compensation for permanent total disability for the period from October 30, 1997, Claimant's date of MMI, and continuing, pursuant to Section 908(a) of the Act.

2. Employer/Carrier shall receive a credit for all wages and compensation paid Claimant as and when paid.

3. Employer/Carrier is responsible for all reasonable and necessary future medical expenses for treatment of her injury by, or at the direction of, Drs. Ruel and Macgregor, under Section 7 of the Act, including intensive psychotherapy three times weekly administered by Dr. Macgregor with the use of psycho tropic medication.

4. Employer/Carrier is responsible for medical benefits for cardiac treatment necessary for the treatment of her back and neck injuries and for prescribing psycho tropic medications.

5. Claimant's attorney shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

ORDERED this 25TH day of July, 2001, at Metairie, Louisiana.

A
CLEMENT J. KENNINGTON
Administrative Law Judge